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IN THE

Supreme Court of the United States

October Term, 1990

PUREX CORPORATION, *et al.*,
Petitioners,

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES A UNITED STATES DISTRICT COURT HAVE JURISDICTION TO ENFORCE A PURPORTED SETTLEMENT AGREEMENT AFTER IT HAS DISMISSED THE UNDERLYING ACTION WITHOUT PREJUDICE, WHEN NO PARTY HAS SOUGHT TO REOPEN THE UNDERLYING LITIGATION OR TO INSTITUTE A NEW FEDERAL COURT ACTION?

II. IS A PARTY ENTITLED TO AN APPELLATE COURT'S DETERMINATION AND APPLICATION OF STATE LAW ON AN ISSUE WHICH WAS RAISED AND ARGUED IN THE DISTRICT COURT, BUT WHICH THE DISTRICT COURT FAILED TO DECIDE?

III. DO FEDERAL COURTS VIOLATE A PARTY'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THEY REFUSE TO CONSIDER A RELEVANT AND MATERIAL ISSUE OF STATE LAW WHICH IS ACTUALLY PRESENTED ON THE RECORD?

PARTIES TO THE PROCEEDING

Petitioners

1. *Purex Corporation* has been merged into Armour-Dial, Inc., and the surviving entity is now known as The Dial Corporation.

2. *The Dial Corporation* is a wholly-owned subsidiary of Armour and Company, which is in turn a wholly-owned subsidiary of Greyhound-Dial Corporation. The Dial Corporation has eight (8) subsidiaries, as follows: Ardison Properties, Inc., Armour Handcrafts, Inc., Armour International Company, Clearly Natural Products, Inc., The Dial Corporation (Hong Kong) Ltd., The Dial Redevelopment Corporation, Fort Madison Dial, Inc., and Purex de Panama, S.A.

Respondents

1. Willis Day Properties, Inc.

2. Able Warehousing & Distributing Company, Inc.

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OPINIONS BELOW

Copies of each of the opinions and orders listed below are included in the appendix to this Petition pursuant to Rule 14(k) of the Rules of the Supreme Court of the United States:

1. Dismissal Entry filed by the United States District Court for the Northern District of Ohio, Western Division, on December 7, 1988.

2. Opinion and Order of the United States District Court for the Northern District of Ohio, Western Division, entered on September 19, 1989, granting Able Warehousing & Distributing Co., Inc.'s Motion to Enforce Settlement, and denying Purex Corporation's Motion to Enforce Settlement.

3. Order of the United States District Court for the Northern District of Ohio, Western Division, entered on October 20, 1989, clarifying the order of September 19, 1989, and granting Willis Day Properties, Inc.'s Motion to Enforce Settlement.

4. Opinion of the United States Court of Appeals for the Sixth Circuit entered on September 11, 1990, affirming the District Court's orders of September 19, 1989 and October 20, 1989.

5. Opinion of the United States Court of Appeals for the Sixth Circuit entered on October 19, 1990, overruling Purex Corporation's and The Dial Corporation's Motion for Rehearing En Banc.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 13 of the Rules of the Supreme Court of the United States, to review the opinion and order of the United States Court of Appeals for the Sixth Circuit which was rendered on September 11, 1990. The United States Court of Appeals for the Sixth Circuit denied Petitioners' Motion for Rehearing En Banc in an opinion rendered on October 19, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Due to the length of the constitutional provisions, statutory provisions, and federal rules at issue in this case, copies of the following provisions are included in the appendix to this Petition:

1. United States Constitution, Amendment V
2. 28 U.S.C. section 1332, Diversity of citizenship
3. 28 U.S.C. section 1652, State laws as rules of decision
4. Federal Rules of Civil Procedure 41 and 60(b)

STATEMENT OF THE CASE

On February 19, 1987, Petitioners, Purex Corporation[1] and the Dial Corporation (collectively "Dial"), originally filed a diversity action under 28 U.S.C. §1332 to recover more than $4,000,000 in damages to personal property and clean-up expenses caused by a fire on July 7, 1985. The fire occurred at a warehouse in Toledo, Ohio owned by Respondent Willis Day Properties, Inc. ("Willis Day") and managed by Respondent Able Warehousing & Distributing Company, Inc. ("Able"). Respondents filed various counterclaims against Petitioners and cross-claims against one another.

On December 7, 1988, the day following settlement discussions among counsel for the parties, the district court dismissed Petitioners' action with the following entry:

> Upon consideration, the Court having been informed that the above-entitled cause of action has been settled between the parties,
>
> IT IS ORDERED that the docket for this case be marked "Settled and dismissed without prejudice." Counsel granted leave to file additional settlement stipulation.

On the same date, Respondents filed a stipulation to dismiss their cross-claims against each other with prejudice. No settlement stipulations were ever filed.

On April 6, 1989, Petitioners' counsel filed a motion for entry of judgment enforcing settlement. Respondent Willis Day opposed that motion, and requested an evidentiary hearing, on April 17, 1989. On April 25, 1989, Respondent Able also opposed Petitioners' motion, and filed its own motion to enforce its version of the purported settlement agreement.

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[1] Purex Corporation was merged into The Dial Corporation and therefore no longer exists. It is only a nominal party to this petition.

The district court held an evidentiary hearing on July 21, 1989 regarding the alleged settlement agreement. All counsel were present at the hearing both to testify as witnesses and to present arguments to the court on their respective motions, and the transcript of the hearing clearly defines the attorneys' respective roles. At the hearing, Petitioners' two attorneys testified that they were not authorized to release Dial's rights to contribution or indemnity in connection with other litigation.[2] This testimony was not rebutted. However, Respondents' counsel testified that all of the attorneys had agreed that Petitioners would release Respondents from *all* claims arising out of the July 7, 1985 fire, including claims for contribution or indemnity.

On September 19, 1989, the district court entered an Opinion and Order requiring Petitioners "to comply with the terms of the settlement agreement as set forth in the letter of December 29, 1988, from Mr. Dawson [Able's counsel] to Mr. Jellinek [Petitioners' counsel]." The court's Opinion and Order found that "the parties ... reached an agreement to settle this case on December 6, 1988." However, it found a conflict among the parties as to the meaning of the terms of their agreement. Consequently, the court said, it was required "to apply a standard of reasonableness to determine which party's intention should be given effect at the expense of the other's."

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[2] At the time of the alleged settlement, Willis Day's insurer, Industrial Risk Insurers ("IRI") had filed an action against Dial for over $10,000,000 in damages to the warehouse building as a result of the fire. However, Dial had not been served with the complaint and had not otherwise received a copy of it before the attorneys conducted settlement discussions. Dial was also named as a defendant in an action by a trucking company for the value of pallets destroyed in the fire. In addition, there were several actions pending against Willis Day and Able for damages incurred by other tenants in the warehouse.

The court determined that "[w]hen Mr. Jellinek [Petitioners' counsel] agreed to settle this case and to release the defendants, a reasonable person in the defendants' attorneys' position would have taken that to be a release of all claims arising out of the July 7, 1985 fire." While noting that the attorneys had specifically discussed the effect of the settlement on the *I.R.I.* litigation (see footnote 2, *supra*), and expressly understood that the settlement would not constitute an "admission of fault that could be used against [Willis Day's] insurer," the court found that "[a]t no time at the December 6, 1988, meeting did Mr. Jellinek specifically reserve the right to assert a third-party claim against Willis Day or Able Warehousing in the *Industrial Risk Insurers* case." The court believed that "[t]he release that Mr. Jellinek purports to have agreed to was not a release at all; in exchange for $650,000.00, his clients hope to be able to renew their claims against Willis Day and Able Warehousing in another forum. A release that purports to settle a suit, but not a claim, violates the principle that consent judgments and settlement agreements generally support claim preclusion but not issue preclusion." The court therefore concluded that Mr. Jellinek had agreed to release Willis Day and Able "from all claims for loss of personal property arising out of the fire of July 7, 1985."

On October 3, 1989, Respondent Willis Day asked the district court to "clarify" its September 19 order by requiring Petitioners to sign a release in favor of Willis Day. Petitioners' counsel responded to this motion by requesting that the court order Petitioners to sign a different release. On October 20, 1989, the court granted Willis Day's request for clarification, and "ordered that the parties execute the 'Release of All Claims'" submitted by counsel for Petitioners.

Prior to the court's ruling on Willis Day's Motion to Clarify, Dial appealed the district court's September 19, 1989 order to the United States Court of Appeals for the Sixth Circuit. That appeal, Docket No. 89-3951, was dismissed on November 13, 1989 for lack of jurisdiction. On November 15, 1989, Dial filed an appeal from both the September 19, 1989 order and the October 20, 1990 order with the Sixth Circuit.

In the Sixth Circuit Court of Appeals, Dial raised three basic issues for the Court's determination: (1) whether the district court has jurisdiction to enforce the alleged settlement, (2) whether Dial's counsel has authority to enter into the alleged settlement, and (3) whether the evidence showed that there was a settlement. In an opinion entered on September 11, 1990, the Sixth Circuit overruled each of the assigned errors. With respect to the jurisdictional issue, the Sixth Circuit held that district " 'courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them.' " Alternatively, the Court said, the district court's dismissal order indicated that the court intended to retain jurisdiction over the action until settlement stipulations were filed by the parties; therefore, the district court had never relinquished jurisdiction.

The Sixth Circuit further held that Dial did not properly preserve the question of its attorneys' authority to settle. Although Dial specifically showed the Court where this issue had been raised in the testimony before the district court, the Sixth Circuit stated that there were "no facts, nor [was] there any ruling of the district court," from which the Court of Appeals could properly review this question. Finally, the Sixth Circuit held that

the District Court's finding of a settlement was not "clearly erroneous," and therefore rejected Dial's contention that there had been no agreement.

Petitioners timely requested a rehearing en banc with respect to the jurisdictional issue and the authority issue. The Sixth Circuit Court of Appeals rejected this request in an order entered on October 19, 1990.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE JURISDICTION OF A DISTRICT COURT TO ENFORCE A SETTLEMENT AFTER DISMISSAL OF THE UNDERLYING ACTION.

There is considerable controversy among the Circuit Courts of Appeals (and sometimes even within each Circuit) on the question whether a district court has jurisdiction to enforce a settlement after its dismissal of the underlying action. Some courts (including the Sixth Circuit) hold that a federal district court has the inherent or ancillary power to enforce a settlement agreement which concerns federal court litigation. *See, e.g., Aro Corp. v. Allied Wittan Co.*, 531 F.2d 1368 (6th Cir. 1976), *cert. denied*, 429 U.S. 862; *Joy Manufacturing Co. v. National Mine Service Co., Inc.*, 810 F.2d 1127 (Fed. Cir. 1987). Others hold that a district court may retain jurisdiction to enforce a settlement agreement by expressly conditioning its dismissal order on the performance of the settlement agreement. *See McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985); cf. *Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987). Still others hold that a district court may reopen the underlying federal court action to enforce a settlement agreement. *See Hinsdale, supra.* Finally, some Courts of Appeals have held that a district court must have an independent jurisdictional basis for enforcing a settlement agreement. *Fairfax Countywide Citizens Assn. v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047.

The jurisdiction of a district court to enforce a settlement agreement after it has dismissed the underlying case is thus clearly an issue which is ripe for

a decision by this Court. The nature of federal courts as courts of limited jurisdiction demands clear, precise, and consistently applied rules regarding the jurisdiction of the district courts. The confusion among the Courts of Appeals concerning the district courts' jurisdiction over settlement disputes can only lead to inconsistent judgments setting unclear jurisdictional bounds. Such confusion is antithetical to the even-handed administration of justice in the federal courts, and is unfair to litigants, who will be arbitrarily subjected to different jurisdictional rules depending on the location of the federal court they find themselves in. This Court should therefore grant this Petition and resolve this question.

In this case, the district court dismissed the original action without prejudice, then ordered specific performance of the alleged settlement agreement, even though none of the parties sought to vacate the dismissal entry or to institute a new federal court action. The Sixth Circuit upheld this exercise of jurisdiction on the ground that the district court had the inherent power to enforce the settlement, or alternatively, that the district court retained jurisdiction when it dismissed the underlying case by granting the parties leave to file settlement stipulations. Neither of these rationales is sound.

A. District courts should not have inherent power to enforce settlement agreements.

The "inherent power" theory was derived from the Sixth Circuit's decision in *Aro Corp. v. Allied Wittan Co.*, 531 F.2d 1368 (6th Cir. 1976), *cert. denied*, 429 U.S. 862. In *Aro*, the Sixth Circuit held that a district court could vacate a dismissal entry pursuant to Fed. R. Civ. P. 60(b), reinstate the underlying case, and enforce the

terms of a settlement agreement. Even though the Court's holding is not so broad, *Aro* is widely cited for the proposition that "courts retain the inherent power to enforce agreements in settlement of litigation pending before them." *See, e.g., Brock v. Scheuner Corp.*, 841 F.2d 151 (6th Cir. 1988); *Bowater N. Am. Corp. v. Murray Machine*, 773 F.2d 71 (6th Cir. 1985); *Joy Manufacturing Co. v. National Mine Service Co., Inc.*, 810 F.2d 1127 (Fed. Cir. 1987).

This theory of inherent jurisdiction to enforce a settlement agreement has been effectively rebutted by other Circuit Courts of Appeal:

> [T]he inherent power of a district court to enforce settlement agreements, like any other power inherently vested in a federal court, presupposes the existence of federal jurisdiction over the case or controversy.

Fairfax Countywide Citizens Assn. v. Fairfax County, 571 F.2d 1299, 1304 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047. In *Fairfax*, the Fourth Circuit Court of Appeals concluded that the district court lacked jurisdiction to enforce a settlement agreement. As in this case and in *Aro*, the underlying lawsuit in *Fairfax* had been dismissed. Moreover, the district court had not approved the settlement agreement and had not incorporated its terms into the court's final order, so the court was not simply enforcing its prior judgment by enforcing the settlement agreement. The court of appeals held that, although the district court had the power to reopen the underlying case and proceed to trial, it was required to have an independent jurisdictional basis to enforce the settlement, because "no considerations of either judicial economy or fairness requir[e] the settlement agreement to be enforced in federal court." *Id.* at 1306.

The inherent jurisdiction of a district court should not necessarily encompass the power to enforce a settlement agreement after dismissal of the action, because federal courts are courts of limited jurisdiction. Federal courts certainly have the power to enforce a settlement agreement which is incorporated into an order, since they clearly have the inherent power to enforce their own judgments. *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974); *Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir. 1985). Similarly, they have the inherent power to enforce stipulations among the parties. *Cummins Diesel Michigan, Inc. v. The Falcon*, 305 F.2d 721, 723 (7th Cir. 1962). However, these principles do not create federal jurisdiction over every settlement dispute, just because the underlying action was in federal court. On this basis, the *Fairfax* court distinguished the authorities relied upon by the Sixth Circuit in *Aro*:

> An analysis of the cases cited by the *Aro* court in support of the principle [of inherent jurisdiction] shows that, except for one, they all concerned settlement agreements which were intended to be incorporated into final orders or for which independent federal jurisdiction existed. The single exception was a state case which involved a court of general, not limited, jurisdiction.

Fairfax, at 1304 (citations omitted); *see also Backers v. Bit-She*, 549 F. Supp. 388 (N.D. Cal. 1982).

Although public policy clearly favors settlement in lieu of litigation, the basis for federal court jurisdiction should be more substantial than "a mere showing that the settlement agreement would not have been entered into but for the existence of litigation pending in federal court." *Fairfax*, at 1305. A settlement agreement is simply a contract, and its enforcement thus involves issues different from the underlying litigation.

Consequently, the considerations of economy which ordinarily support the exercise of pendant and ancillary jurisdiction do not apply to the enforcement of a settlement agreement. *Id.* Nor does the need for an independent jurisdictional ground render settlement a "trap for the unwary," as the *Aro* court suggested. If the aggrieved party cannot establish federal jurisdiction over the settlement dispute, he can pursue his remedies in state court or reopen the underlying federal litigation. *Id.*

Other courts have agreed with the rationale of the *Fairfax* opinion. In *Musifilm, B.V. v. Spector,* 568 F. Supp. 578, 581 (S.D.N.Y. 1983), the court also concluded that "once an action has been terminated, a district court has no power to enforce a settlement which it neither ordered nor approved, absent an independent ground of jurisdiction." Like *Aro* and *Fairfax*, in *Musifilm,* one party attempted to re-open the original case in order to have a court interpret the rights of the parties under their settlement agreement. *Id.* at 580. The court rejected the notion that it was under a duty to decide a dispute regarding the interpretation of the settlement agreement. *Id.* Because it "did not review that agreement (settlement) or order compliance with its terms" in connection with the original action, the defendants were required to institute a separate proceeding in federal or state court. *Id.*, at 582.

Settlement disputes ordinarily arise in two contexts. Where the underlying action is still pending, and one party seeks to terminate the action by enforcing the settlement:

> the enforcement proceeding is logically held in the context of the pending action. If the court determines that the agreement is valid, it will order

> the action dismissed. If, on the other hand, the court finds the agreement invalid, the action will remain open on its docket.

Musifilm, at 581; *see also Londono v. Gainesville*, 768 F.2d 1223 (11th Cir. 1985). Similarly, a "terminated action is the logical context for resolution of the settlement dispute when the moving party seeks to *reinstate, and litigate*, that action." *Musifilm*, at 582. (emphasis added). However, neither logic nor economy nor the policy of encouraging settlements dictates that the original action is an appropriate forum for litigating disputes over the meaning of a settlement agreement. *Id.*, at 582-83; *In re Rush*, 49 B.R. 158, 162-63 (Bankr. N.D. Ala. 1985); cf. *United States v. American National Bank and Trust Co.*, 101 F.R.D. 770 (N.D. Ill. 1984) (it is inappropriate to vacate original judgment to litigate about an accord reached after the judgment).

For all of the foregoing reasons, Petitioners ask this Court to grant this Petition and to decide that there must be an independent jurisdictional basis for a district court to enforce a settlement agreement after it has dismissed the underlying suit. Judicial economy is served, not undermined, by requiring an independent jurisdictional basis for a suit to enforce a settlement, because the contract issues involved in enforcing a settlement are based on different operative facts than the original claim. *Fairfax*, at 1305; *Musifilm*, at 583. The substantive rights and duties affected by a settlement are entirely a matter of state contract law. *Auer v. Kawasaki Motor Corp., U.S.A.*, 830 F.2d 535, 537-38 (4th Cir. 1987), *cert. denied*, 485 U.S. 905; *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 487 (6th Cir. 1973). The mere fact that a related matter was once before a federal court should not be sufficient to establish federal court jurisdiction over a settlement agreement; otherwise, the

limited nature of federal courts' jurisdiction would be completely abrogated. Although public policy and judicial economy favor settlement agreements in lieu of litigation, these considerations are not disregarded when the court requires an independent basis for asserting jurisdiction over a settlement after the underlying action has been dismissed. A dispute over a settlement "is separate and distinct from the dispute underlying the original action," so a new, separate federal or state action is more appropriate. *Musifilm*, at 582-583; *Harman v. Pauley*, 678 F.2d 479 (4th Cir. 1982) (interests of justice did not require vacation of prior dismissal order to enforce settlement).

In this case, the district court did not incorporate the purported settlement agreement into its prior dismissal order and (as will be discussed below) did not retain jurisdiction over the settlement in the original suit. None of the parties sought to reopen and litigate the underlying action. Thus, the district court lacked jurisdiction. Furthermore, even if the parties had sought to vacate the prior dismissal order, the original negligence action was not an appropriate jurisdictional basis for asking the court to resolve their settlement dispute. Thus, the district court here lacked the power to enforce the purported settlement agreement, and this Court should grant this Petition, vacate the district court's judgment and dismiss this appeal.

B. A district court cannot retain jurisdiction to enforce a settlement agreement.

The "retained jurisdiction" theory was promulgated in the case of *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985). In *McCall-Bey*, the Seventh Circuit Court of Appeals held that the district court had retained jurisdiction when it dismissed the underlying action under Fed. R. Civ. P. 41 (a)(2) based upon a stipulation of

the parties which expressly gave them a "right to petition the court to enforce the [settlement] agreement." *Id.*, at 1188. The court stated that it had "no doubt of the power of a district judge to dismiss a lawsuit conditionally, retaining jurisdiction to effectuate terms of settlement agreed to by the parties." *Id.*, at 1188. According to the court, no magic words were necessary to retain jurisdiction after dismissal, so long as "it be possible to infer that [the district court] did intend to retain jurisdiction—that he did not dismiss the case outright, thereby relinquishing jurisdiction." *Id.*

The retained jurisdiction theory, like the inherent jurisdiction theory, implies that a district court can retain jurisdiction forever to enforce the terms of a settlement agreement which was not incorporated into the court's final order. No consideration of economy or fairness indicate that the district court should have such power. Nor is such power implicit in the terms of Fed. R. Civ. P. 41(a)(2). There is a serious question whether a district court can require the parties to return to the court for enforcement of their settlement agreement as a "term or condition" of dismissal under Fed. R. Civ. P. 41(a)(2):

> [T]here is no direct authority on the issue . . . it can be argued with some force that the only consequence of violating a term or condition imposed under Rule 41(a)(2) are either to undo the settlement and restore the case to the court's docket or to change a dismissal without prejudice, the normal consequence under Rule 41(a)(2), into a dismissal with prejudice.
>
> * * * *
>
> Neither the language nor history of [Rule 41(a)(2)] suggests that it empowers the judge to order specific performance of the parties' undertakings in the settlement agreement.

McCall-Bey at 1183, 1184. Thus, a "term or condition" upon a court-ordered dismissal without prejudice may impose consequences if the parties take, or fail to take, the actions specified in the order: the court may dismiss the action with prejudice, or it may reopen the underlying litigation. However, nothing in Civil Rule 41(a)(2) indicates that the court may retain the power to order specific performance of an agreement which has not been made part of its final order, as a "term of condition" of a dismissal without prejudice.

The retained jurisdiction theory, like the inherent jurisdiction theory, also "presupposes the existence of federal jurisdiction over the case or controversy." *Fairfax, supra,* at 1304. To retain jurisdiction, the district court must condition its dismissal order on the performance of a settlement agreement which had not been made a part of the court's final order.[3] Yet, a dismissal under Fed. R. Civ. P. 41(a)(2) is presumptively given without prejudice, and the parties are therefore left in the same position they were in before the suit was filed. They are free to refile the original lawsuit or to sue to enforce the settlement. There is therefore no compelling reason why the federal court which heard the original case should retain jurisdiction to enforce the settlement.

In any event, the applicability of the retained jurisdiction theory is extremely limited. Most settled cases are dismissed under Fed. R. Civ. P. 41(a)(1)(ii) by stipulation of the parties, not by court order under Fed. R. Civ. P. 41(a)(2). Fed. R. Civ. P. 41(a)(1) does not give a district court the power to impose terms or conditions on its dismissal order. Therefore, the retained jurisdiction

[3] Even the Seventh Circuit Court of Appeals in *McCall-Bey* expressed "profound doubt" that a district court *automatically* retains jurisdiction to enforce a settlement agreement when it dismisses an action under Civil Rule 41(a)(2). *McCall-Bey, supra,* at 1188.

theory will not govern the usual case. Moreover, the entire basis of retained jurisdiction is the court's expressed intention to make such jurisdiction a condition of dismissal; absent such an expressed intention, there is presumably no retained jurisdiction.

Even if the district court here had the *power* to retain jurisdiction when it dismissed the underlying case, it did not actually do so. The very fact that the district court dismissed the action *without prejudice,* and granted the parties *leave* to file stipulations, shows why the court could not have intended to retain jurisdiction. The court dismissed the action without prejudice because it had not been presented with written settlement stipulations or other evidence to show that the parties had actually reached a settlement. The court granted *leave* to file settlement stipulations, but none were ever agreed upon or filed. The court could not have intended to retain jurisdiction to enforce a non-existent settlement agreement, or non-existent stipulations. Therefore, there are no grounds to infer that the district court conditioned its dismissal order upon compliance with a settlement agreement, or retained jurisdiction to enforce any settlement terms.

The parties in this case did not ask the district court to reinstate the previous lawsuit by vacating the prior dismissal order, nor did they institute a new action for specific performance of the settlement agreement. Even if it had the power to do so, the district court did not expressly or impliedly retain jurisdiction to enforce the settlement agreement when it dismissed the original action. Therefore, the district court lacked jurisdiction to enforce the settlement agreement and this Court should grant this Petition, vacate the district court's judgment and dismiss the instant appeal.

II. A LITIGANT IS ENTITLED TO AN APPELLATE COURT'S DETERMINATION OF STATE LAW ON AN ISSUE WHICH WAS PROPERLY PRESENTED AND ARGUED BEFORE THE DISTRICT COURT, BUT WHICH THE DISTRICT COURT FAILED TO DECIDE.

This Court recently granted certiorari to determine whether a party is entitled to a *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship. *Salve Regina College v. Russell,* United States Supreme Court Docket No. 89-1629. This case presents a related question.

In this case, the district court made *no* determination whether Petitioners' attorneys had or were required to have authority to enter into the alleged settlement under Ohio law, although that issue was raised by the evidence and argued by counsel at the evidentiary hearing. The Sixth Circuit Court of Appeals refused to decide the question because the district court had not addressed it and, according to the court, the issue was not raised on the record. Petitioners contend that they were entitled to a determination by the Court of Appeals of the legal question whether they were bound by an admittedly unauthorized settlement.

Ever since this Court's decision in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), there has been no question that "federal courts sitting in diversity cases, when deciding questions of 'substantive' law, are bound by state court decisions as well as state statutes." *Hanna v. Plumer,* 380 U.S. 460, 465 (1965). This rule, which is also embodied in the Rules of Decision Act, 28 U.S.C. §1652, requires that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would

be if tried in a state court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945); cf. *Felder v. Casey*, 487 U.S. 131 (1988).

When state law governs the case before a federal court, it seems apparent that the court should apply the entire body of applicable state law. Were it otherwise, the court could make the outcome of the case different than it would have been if the case had been tried in state court, simply by choosing the state law principles it wanted to apply. The interests of justice demand that courts should not have such unbridled power to affect the outcome of a case. If a district court fails to apply the relevant state law to the facts of the case, then the court of appeals should correct this defect, since appellate courts, like district courts, are bound to follow state law in cases where state law applies. See *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944).

In this case, there was no question that Ohio law governed the enforceability of the alleged settlement agreement. The enforceability of a contract is obviously a matter of state law. Cf. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). Counsel for the parties entered into their purported settlement agreement in Ohio to compromise a cause of action which arose in Ohio, so Ohio law clearly applied.

In finding that there was a settlement agreement and in defining its terms, however, the district court ignored a highly pertinent question of Ohio contract law. The district court made no determination whether Petitioners' attorneys had authority to enter into the alleged settlement, even though undisputed testimony at the evidentiary hearing showed that the attorneys lacked authority. The district court also failed to decide whether

such authority was necessary to bind Petitioners to the alleged settlement agreement although that issue was argued by counsel.

It is well settled under Ohio law that a court may not enforce a settlement agreement entered into between counsel absent evidence that counsel had authority to settle. *Ottawa County Commrs. v. Mitchell*, 17 Ohio App. 3d 208 (Ottawa App. 1984). The rule requiring testimony regarding the attorney's authority is merely an extension of the general rule that there must be proof of an agent's authority to bind the principal. *See, e.g., Gardner Plumbing, Inc. v. Cottrill*, 44 Ohio St. 2d 111, 115 (1975).

Like courts in other states, Ohio courts hold that a contract entered into by an agent is not enforceable against his principal unless the agent had authority to enter into the contract on the principal's behalf. *Miller v. Wick Bldg. Co.*, 154 Ohio St. 93, 93 N.E.2d 467, 469 (1950); *Kirk Williams Co. v. Six Industries, Inc.*, 11 Ohio App. 3d 152, 154, 463 N.E.2d 1266, 1269 (Clark App. 1983). As a general matter, an agent's authority to contract on behalf of his principal may be express, implied, or apparent. *Miller, supra*, 93 N.E.2d at 470.

With respect to the authority of attorneys, Ohio courts have consistently held that:

> An attorney who is without special authorization has no implied or apparent authority, solely by virtue of his general retainer, to compromise and settle his client's claim or cause of action.

Morr v. Crouch, 19 Ohio St. 2d 24, paragraph two of the syllabus (1969). The rationale behind this rule is apparent: An attorney who had been retained to *prosecute or defend* an action is not expressly, impliedly or apparently authorized by that retainer to *compromise*

the client's claimed rights. *See Annot.*, Authority of Attorney to Compromise Action, 30 A.L.R.2d 944, 947 (1953); *Massachusetts Cas. Ins. Co. v. Forman*, 469 F.2d 259, 261 (5th Cir. 1972) *cert. denied*, 424 U.S. 914. Therefore, a litigant will be bound by a settlement entered into by his attorney only if he has given the attorney express authority to settle or if he subsequently ratifies the agreement. *Morr v. Crouch*, 19 Ohio St. 2d 24 (1969); *Ottawa County Commrs. v. Mitchell*, 17 Ohio App. 3d 208 (Ottawa App. 1984).[4]

The district court's decision said nothing about the attorneys' authority to settle the underlying case, even though that issue had been raised by undisputed testimony on the record. In the Sixth Circuit Court of Appeals, Petitioners again raised and argued this issue of state law, but the Court declined to decide it, stating that Petitioners "did not properly preserve this issue for appeal" because the district court had not ruled on it and, according to the court, the question was not raised on the record.

The district court's failure to consider the authority issue did not absolve the Court of Appeals from its obligation to determine and apply Ohio law to the undisputed facts in the case. Even if an appellate court should ordinarily defer to a trial court's reasonable interpretation of state law, *Proper v. Clark*, 337 U.S. 472, 486-87 (1949), there can be no reason for deference to a district court decision when the district court does not decide a state law issue that is presented on the record. Moreover, appellate court deference should not mean blind adherence to a district court's determinations. If state court decisions show that the district court is

[4] Respondents disputed this proposition in the Sixth Circuit Court of Appeals.

legally incorrect on a question of state law, federal appellate courts are obligated to follow the state court rulings, and to reverse the district court decision. *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

In this case, the Sixth Circuit's refusal to decide whether Petitioners' attorneys had or were required to have authority to enter into the alleged settlement under Ohio law violated the requirements of 28 U.S.C. §1652 and the federalism principles espoused in this Court's ruling in *Erie*. This Court should therefore grant this Petition and should reverse and remand this case for a determination of the state law question presented.

III. A LITIGANT IS DENIED DUE PROCESS WHEN A FEDERAL COURT REFUSES TO DECIDE A RELEVANT AND MATERIAL STATE LAW ISSUE WHICH IS ACTUALLY PRESENTED TO THE COURT.

The refusal of the two lower federal courts to determine the applicable state law and to apply it to the undisputed facts of this case also denied Petitioners of their fundamental right to due process of law under the Fifth Amendment.

This Court has indicated that it is a violation of the Due Process Clause of the 14th Amendment when one state's construction of another state's laws contradicts the law of the other state, at least where the other state's law is clearly established and has been brought to the court's attention. *See Sun Oil Co. v. Wortman*, 486 U.S. 727 (1988); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917). Surely, if it is a violation of due process to decide an issue incorrectly, it is a violation of due process to not decide the issue at all.

At a minimum, the Due Process Clause guarantees litigants of notice and an opportunity to be heard by an impartial decisionmaker. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *In Re Murchison*, 349 U.S. 133, 136 (1965). These rights are meaningless unless the court is required to respond to the questions presented for its decision. When issues are actually presented for decision, are relevant to the facts, and are material to the outcome of the case, the court's failure or refusal to decide the issue deprives the party of a meaningful opportunity to have its dispute fully determined by a court of law. This is not

fundamentally fair to the litigant, who will be bound by the decision, nor does it serve the interests of society as a whole, which relies upon the court system to decide disputed questions.

Of course, there are many circumstances in which a court can properly refuse to decide an issue involved in a case pending before it. The issue could be undisputed, and therefore properly assumed by the court. It could be rendered moot by another decision of the court. Barring such circumstances, however, Petitioners assert that they have a fundamental right to have their dispute determined by the court on every relevant and material issue actually presented.

By picking and choosing the issues they wished to decide, the lower courts here may well have altered the result of the proceeding to enforce the alleged settlement. As a matter of state law, Petitioners should not have been bound by a contract made by an agent who lacked authority. By refusing to even address this state law question, however, the lower courts enforced the alleged settlement agreement and therefore made the outcome in this case different than it would have been if tried in a state court. This violates the Due Process Clause. This Court should therefore grant this Petition and reverse and remand this case for a determination of the state law questions presented.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 11, 1990)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.]

No. 89-4032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PUREX CORPORATION, *et al.*,
Plaintiffs-Appellants,

v.

WILLIS DAY PROPERTIES, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: KENNEDY, BOGGS, and SUHRHEINRICH, *Circuit Judges.*

SUHRHEINRICH, *Circuit Judge.* This case involves the district court's construction and enforcement of the terms of an oral settlement agreement entered into

between the parties on the eve of trial. The underlying litigation arose out of a fire causing property damage to a warehouse and its contents. After conducting an evidentiary hearing on the terms of the settlement agreement, the district court held that the appellants, who owned goods that were destroyed in the warehouse, released "all claims" against the appellees, the warehouse owner and manager. Appellants raise three arguments on appeal. First, appellants contend that the district court relinquished its jurisdiction when, after being informed by the parties that an oral settlement agreement had been reached, the court *sua sponte* entered an order dismissing the case. Second, appellants argue that their attorneys lacked the requisite authority to enter into a settlement agreement under the terms found to exist by the district court. Third, appellants claim that the district court's findings of fact concerning the terms of the settlement agreement were clearly erroneous. For the reasons stated below, we affirm the district court's order enforcing the oral settlement agreement.

I.

On July 7, 1985, a fire destroyed a warehouse, owned by Willis Day Properties, Inc. ("Willis Day") and managed by Able Warehousing & Development Company ("Able"), and the goods contained therein, some of which were owned by Purex Corporation. On the date of the fire, Purex Corporation was wholly owned by, and is now merged with, the named co-plaintiff, Dial Corporation. Plaintiffs Purex Corporation and Dial Corporation (hereinafter collectively referred to as "Purex") sued Willis Day and Able for damages to the goods and for clean-up expenses, allegedly in excess of 4.3 million dollars. Able counterclaimed for the clean-up

expenses it incurred, which were allegedly in excess of $10,000.00. Purex has received $3,861,211.00 from its insurer, Underwriters at Lloyds ("Lloyds").[1] Willis Day's insurer, Industrial Risk Insurers ("IRI"), has filed a separate suit against Purex for the cost of damages to the real property ("IRI Litigation").

On December 6, 1988, one day before the scheduled trial, the attorneys for the respective parties conferred and reached an oral settlement agreement. On December 7, 1988, after being informed that the case had been settled, the district court judge dismissed the case without prejudice and simultaneously granted the parties leave to file settlement stipulations. No settlement stipulations were ever filed. After several months of failed attempts to reduce the agreement to writing, Purex and Able filed cross-motions for judgments to enforce each party's version of the December 6, 1988 settlement agreement. Based upon findings of fact made at a July 21, 1989 evidentiary hearing, the district court ordered Purex to release "all claims" against Willis Day and Able. A clarification of the court's initial order stated that Purex could not pursue contribution or indemnity claims in any pending or future litigation, including but not limited to the IRI litigation, arising from the warehouse fire. Purex now appeals from the order and clarification entered by the district court.

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[1] Although not a named party in the litigation below, Lloyds attempted to intervene in this appeal, designating itself as a "plaintiff-appellee." Because the Federal Rules of Appellate Procedure do not provide for intervention by a non-party at the appellate level, this Court is left no choice but to refuse intervention and decline consideration of Lloyds' brief.

II. DISCUSSION

A. Jurisdiction

Purex's initial argument on appeal is that the district court relinquished its jurisdiction when it dismissed the case *sua sponte* without prejudice, on December 7, 1988. The district court's order reads as follows:

> Upon consideration, the court having been informed that the above entitled cause of action has been settled between the parties, it is ordered that the docket for this case be marked 'settled and dismissed without prejudice'. Counsel granted leave to file additional settlement stipulations.

The narrow issue presented is whether this is a "conditional" or an "unconditional" dismissal order as entered by the district court.

It is well settled that "courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976); *All States Investors, Inc. v. Bankers Bond Co.*, 343 F.2d 618, 624 (6th Cir.) 1, *cert. denied*, 382 U.S. 830, *reh'g denied*, 382 U.S. 922 (1965). Further, no specific language is necessary to effect a "conditional" as opposed to an "unconditional" dismissal: "[A]ll that is necessary is that it be possible to infer that [the trial judge] did intend to retain jurisdiction—that he did not dismiss the case outright, thereby relinquishing jurisdiction." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985).

A plain reading of the district court's dismissal order indicates that it fully intended to retain jurisdiction over this matter until settlement stipulations were filed by the parties. It is also worth noting that the parties,

including Purex, construed the dismissal as "conditional" as evidenced by the motions for enforcement that were filed with the district court approximately four months subsequent to the district court's dismissal order.

Purex's reliance on our decision in *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987) is misplaced. The *Hinsdale* decision turned on the jurisdictional impact of a *concededly* "unconditional" dismissal entered by the district court. *Id.* at 995. Furthermore, the parties in *Hinsdale* had already signed a settlement stipulation, pursuant to Fed. R. Civ. P. 41(a)(1), at the time of the dismissal. *Id.* In this case, by contrast, the district court specifically granted the parties leave to file such settlement stipulations at the time of the dismissal.

B. Purex's Attorney's Settlement Authority

Purex claims that the December 6, 1988 settlement agreement cannot be enforced because the attorneys representing Purex lacked the requisite express authority to enter into such an agreement.[2] To support this contention, Purex argues that its attorneys were never expressly authorized to settle the litigation under the terms as found to exist by the district court. However, we find nothing in the record which indicates that Purex

[2] Purex also argues that one of the attorneys who negotiated the settlement, Mr. Jellinek, represented Purex's insurance carrier, Lloyds, but did not represent Purex. However, attorneys Jellinek and Ellenburger participated in the action as counsel for the plaintiffs for the initial 15 months of this lawsuit; and this fact is evidenced by their listing on all pleadings as counsel for plaintiffs, Purex and Dial. There was no indication at any critical time during the proceedings before the district court that Jellinek represented Lloyds and not Purex. In fact, Lloyds has never been a named party to this lawsuit.

raised the issue of its attorney's authority to settle this lawsuit in the lower court. There are no facts, nor is there any ruling by the district court, from which this Court can properly review Purex's contention that its attorneys overreached their settlement authority. Accordingly, we hold that Purex did not properly preserve this issue for appeal. *Bailey v. Chattem, Inc.*, 684 F.2d 386 (6th Cir. 1982).[3]

C. Terms Of The Settlement Agreement

Purex and Able each filed motions for judgments to enforce the oral settlement agreement. Purex now claims that the terms of the agreement, as decided by the district court, do not reflect the actual agreement reached between the parties. Under Purex's version of the disputed terms, Purex would receive $650,000.00 in return for dismissing the instant lawsuit. Purex would then be able to file a cross-claim for contribution and/or indemnity against Willis Day and Able in the IRI and any other litigation arising out of the fire. Under Willis Day's and Able's version of the disputed terms, which

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[3] In any event, Purex relies on several Ohio cases that discuss the authority of an attorney to make binding agreements on behalf of his client in the context of real estate transactions. *See Morr v. Crouch*, 19 Ohio St.2d 24, 249 N.E.2d 780 (1969); *Ottawa County Comm'rs v. Mitchell*, 17 Ohio App. 3d 208, 478 N.E.2d 1024 (1984). While these cases apparently require that an attorney have "express" authority to act on behalf of his client in conveying real property, it is less clear whether the more rigorous agency principles found in real estate transactions apply equally to other areas of the attorney-client relationship. *See Argo Plastics Products Co. v. City of Cleveland*, 15 Ohio St.3d 389, 474 N.E.2d 328, 331 (1984) (if an attorney exceeds his authority or enters into an agreement against the wishes of his client, the client's remedy lies in an action for malpractice, not in an appeal to set aside an otherwise valid settlement agreement); *Weir v. Needham*, 26 Ohio App.3d 36, 498 N.E.2d 175 (1985); *Miller v. Wick Bldg. Co.*, 154 Ohio St. 93, 93 N.E.2d 467 (1950).

the district court ultimately adopted, Purex would be prevented from seeking contribution or indemnity from Willis Day or Able in any action filed by a third party against Purex for damages resulting from the fire.

The standard for review concerning factual disputes in cases such as this is well settled: "Although [the appellate court] may freely review the district court's legal conclusions concerning the existence of an enforceable oral contract, its subsidiary factual determinations must be upheld unless they are clearly erroneous." (footnote omitted). *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 143 (6th Cir. 1983). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, *reh'g denied*, 333 U.S. 869 (1948).

At the evidentiary hearing conducted by the district court on July 21, 1989, testimony was introduced from eight attorneys involved in the underlying litigation, seven of whom were present at the settlement conference. Exhibits were offered into evidence and closing arguments were made to the court. The district court specifically found that the testimony of Purex's attorney, Mr. Jellinek, was not convincing. Other attorneys testified that by "release" the parties intended that Willis Day and Able would be completely removed from all litigation concerning the warehouse fire. After a careful review of the record and, specifically, the testimony of the attorneys introduced at the evidentiary hearing, we hold that the district judge's findings of fact were not clearly erroneous.

AFFIRMED

DISMISSAL ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed December 7, 1988)

No. C87-7139

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PUREX CORPORATION, *et al.*,
Plaintiff(s),

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Defendant(s).

DISMISSAL ENTRY

Upon consideration, the Court having been informed that the above-entitled cause of action has been settled between the parties,

IT IS ORDERED that the docket for this case be marked "Settled and dismissed without prejudice." Counsel granted leave to file additional settlement stipulation.

/s/ RICHARD B. MCQUADE, JR.
United States District Judge

Toledo, Ohio
December 6, 1988

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed September 19, 1989)

No. C87-7139

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PUREX CORPORATION, *et al.*,
Plaintiff(s),

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Defendant(s).

OPINION AND ORDER

On July 7, 1985, a fire destroyed a warehouse at 5225 Telegraph Road, Toledo, Ohio, owned by defendant Willis Day Properties, Inc., and managed by defendant Able Warehousing & Distributing Company, Inc. The plaintiffs, Purex Corporation and The Dial Corporation, filed this suit for damages to personal property and for clean-up expenses caused by the fire. The defendants filed various counterclaims and cross-claims. On December 6, 1988, the parties engaged in settlement negotiations and allegedly reached an agreement, the terms of which are now in dispute. The plaintiffs filed a motion for entry of judgment enforcing their version of the settlement agreement. Defendant Willis Day opposed this motion and filed a motion for an evidentiary hearing to determine the precise terms of the alleged settlement

agreement. Defendant Able Warehousing also opposed the plaintiffs' motion and filed a motion to enforce its version of the settlement agreement. The court held an evidentiary hearing on July 21, 1989, at which the attorneys representing the parties testified as to the terms of the alleged settlement agreement. For the following reasons, the plaintiffs' motion is denied and defendant Able Warehousing's motion is sustained.

Settlement negotiations in this case were complicated by the fact that a case had been filed on December 2, 1988, by Industrial Risk Insurers, the fire insurance carrier for Willis Day, against Purex in the Court of Common Pleas for Lucas County, Ohio. *Industrial Risk Insurers v. Purex Corp.*, No. 88-3849 (C.P. Ohio Dec. 2, 1988). The controversy over the settlement agreement in the case before this court is whether the plaintiffs reserved the right to assert a third-party claim against Willis Day and Able Warehousing in the *Industrial Risk Insurers* case.

The parties do not dispute that the defendants agreed at the December 6, 1988, meeting to pay $650,000.00 to plaintiffs to settle this case. Beyond this, however, the parties agree to very little. The defendants contend that the plaintiffs agreed, in return, to release all claims arising out of the June 7, 1985 fire. The plaintiffs assert that they agreed only to release the claims at issue in this case, and reserved the right to assert a third-party claim for contribution or indemnity against Able Warehousing and Willis Day in the *Industrial Risk Insurers* case. The question to be resolved is a factual one: Did Miles A. Jellinek, attorney for plaintiffs, agree to release Willis Day and Able Warehousing from all claims arising out of the fire, thereby precluding plaintiffs' filing a third-party claim against Willis Day and Able Warehousing in the *Industrial Risk Insurers* case?

This court possesses the power to enter a judgment enforcing an agreement entered into to settle litigation pending before it. *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976). *Contra McCall-Bey v. Franzen*, 777 F.2d 1178, 1186-88 (7th Cir. 1985) (rejecting *Aro Corp.* and holding that there is no inherent federal jurisdiction to enforce agreements to settle federal suits). This power emanates from the policy favoring the settlement of disputes and avoidance of costly litigation. *Kukla v. National Distillers Prods. Co.*, 483 F.2d 619, 621 (6th Cir. 1973). Where there are questions of fact concerning the existence or the terms of an agreement to settle, an evidentiary hearing should be held to determine whether an agreement was reached and what the terms of that agreement are. *Id.* at 621-22. Such a hearing was held in this case on July 21, 1989.

A settlement agreement is a contract. *Aro Corp.*, 531 F.2d at 1372. Where there is a dispute as to the existence or the terms of an agreement, the court will apply general contract principles. *Echols v. Nimmo*, 586 F. Supp. 467, 469 (W.D. Mich. 1984). The fact that the parties failed to reduce the settlement agreement to a written document does not mean that a contract was not formed. Provided that the parties understood the terms of the agreement and intended to be bound by its terms, an enforceable contract, though not in writing, is created. *Arnold Palmer Golf Co. v. Fugua Indus., Inc.*, 541 F.2d 584, 587 (6th Cir. 1976) (applying Ohio law); *McMillen v. Willys Sales Corp.*, 118 Ohio App. 20, 193 N.E.2d 160 (1962). *See also Restatement (Second) of Contracts* §27 (1981) ("Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also

manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.").

The court finds that the parties advanced beyond preliminary negotiations and reached an agreement to settle this case on December 6, 1988. That agreement, though not in writing at the time, constitutes a binding, valid contract between the parties. There is a conflict, however, as to the meaning of the terms of the agreement to settle the case. When the parties to a contract attach different meanings to language, the court's task is to apply a standard of reasonableness to determine which party's intention should be given effect at the expense of the other's. *See* E.A. Farnsworth, *Contracts* §3.6, at 113-16 (1982) (quoting *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913) (Learned Hand, J.) ("If ... it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of the sort."). The court can supply definite meaning for disputed language by referring to the course of dealing between the parties or usage of trade. *See Restatement (Second) of Contracts* §33 comment a (1981).

The testimony offered at the evidentiary hearing indicates that the parties discussed the effect that settling this case would have on the *Industrial Risk Insurers* case. Stephen A. Petras, counsel for Willis Day, voiced his understanding that by settling this case, Willis Day was making no admission of fault that could be used against its insurer in the *Industrial Risk Insurers* case. Mr. Jellinek then offered his

understanding that the settlement of this case did not preclude his clients from raising the issue of Willis Day's and Able Warehousing's culpability in the *Industrial Risk Insurers* case. At no time at the December 6, 1988, meeting did Mr. Jellinek specifically reserve the right to assert a third-party claim against Willis Day or Able Warehousing in the *Industrial Risk Insurers* case. When Mr. Jellinek agreed to settle this case and to release the defendants, a reasonable person in the defendants' attorneys' position would have taken that to be a release of all claims arising out of the July 7, 1985 fire.

The court finds that Mr. Jellinek's testimony as to the substance of the agreement reached on December 6, 1988 is not convincing. When questioned about his recollection of the meeting, the following exchange ensued:

> Q. Do you recall both Steve [Steven J. Petras, attorney for defendant] and I [Charles J. French, III, attorney for defendant] during that conversation in December saying that, Miles, it's over as to Willis Day Property Inc., we're out of this, nobody can bring us back in; do you recall that?
>
> A. Out of what? This case, yeah. We settled this case. This is the case that—the only case I have ever been handling.
>
> Q. I guess you agree with my statement, you recall that conversation?
>
> A. Not explicitly, but there is no dispute we settled this case.
>
> Q. Do you recall that the issue of whether you could preserve your rights for contribution and indemnification in the IRI [Industrial Risk Insurers] case was mentioned; do you recall that?
>
> A. No.

Q. Do you recall saying what about the IRI case, do we have the right to contribution and indemnification, and everyone in the rooms said, no, those are affirmative defenses that IRI would be allowed to raise as a subrogated insurance company for Willis Day and those are affirmative defenses, merely setoffs? You and Mr. Ellenberger [attorney for plaintiff] agreed to that, do you recall that?

A. In those terms, no, but let me comment on that because I don't think there is a disagreement. Okay? May I answer your question?

Q. I think you have. I think you have. You don't recall that?

A. I don't recall any specific discussion about the moral nuances of whether the fault of Willis Day was going to be pleaded as an affirmative defense or as a third party complaint, but if you were to ask me, I would tell you that I don't think that's a proper joinder even though I'm not an expert in Ohio law because if the joinder under Rule 14 by Purex of Willis Day is on the basis that Willis Day may be liable to Purex on the cause of action sued upon by IRI, it would never get that far because if Willis Day is 40 percent responsible, IRI's recover would be diminished by 40 percent and consequently, there would be no basis for the cross claim.

Q. It is exactly—

A. No disagreement.

Q. We discussed that whole issue, exactly what you have—the way you have just stated it on December 6th?

A. Okay.

Transcript of Hearing at 21-22, *Purex Corp. v. Willis Day Properties, Inc.*, No. 87-7139 (N.D. Ohio July 21, 1989).

The specific language of written release agreements varies with the particular circumstances of a case. At a minimum, however, the purpose of a release is to provide the party who is being released from a claim with a sense of repose and finality. The release that Mr. Jellinek purports to have agreed to was not a release at all: in exchange for $650,000.00, his clients hope to be able to renew their claims against Willis Day and Able Warehousing in another forum. A release that purports to settle a suit, but not a claim, violates the principle that consent judgments and settlement agreements generally support claim preclusion but not issue preclusion. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4443, at 385-88 (1981 & Supp. 1989). A settlement agreement precludes a party to that agreement from relitigating a claim upon which the original suit was based. Were it otherwise, the efficacy of settlement agreements and consent judgments would be drastically diluted. What incentive would there be to settle a case if the other party could relitigate the same claims in another lawsuit?

The court concludes that when Mr. Jellinek agreed to accept $650,000.00 from Willis Day and Able Warehousing, he agreed to release those parties from all claims for loss of personal property arising out of the fire of July 7, 1985.

It is therefore

ORDERED that the plaintiffs' motion for entry of judgment enforcing settlement agreement is denied;

FURTHER ORDERED that the motion of defendant Able Warehousing to enforce settlement is sustained, and the plaintiff is ordered to comply with the terms of the settlement agreement as set forth in the letter of December 29, 1989, from Mr. Dawson to Mr. Jellinek.

/s/ RICHARD B. MCQUADE, JR.
United States District Judge

Toledo, Ohio
September 19, 1989

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 20, 1989)

Case No. C 87-7139

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PUREX CORPORATION, *et al.*,
Plaintiff(s),

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Defendant(s).

ORDER

WALINSKI, *J.*

This matter is before the Court on the motion of defendant Willis Day Properties, Inc. to clarify the Opinion and Order of this Court dated September 19, 1989, and the plaintiffs' opposition thereto.

The Opinion and Order of this Court dated September 19, 1989, sustained the motion for defendant Able Warehousing and Distributing Company, Inc. to enforce the settlement agreement reached by the parties. The Court finds that the defendants' request for clarification is well taken.

It is therefore,

ORDERED that the parties execute the "Release of All Claims" as found at Exhibit A attached to the plaintiffs' Memorandum in Opposition to Motion of Defendant Willis Day Properties, Inc. to clarify Opinion and Order of the Court.

/s/ NICHOLAS J. WALINSKI
Senior U.S. District Judge

Toledo, Ohio
October 20, 1989

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

(Filed October 19, 1990)

No. 89-4032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PUREX CORPORATION; DIAL CORPORATION,
Plaintiffs-Appellants,

v.

WILLIS DAY PROPERTIES, INC.;
ABLE WAREHOUSING AND DISTRIBUTING COMPANY, INC.,
Defendants-Appellees.

ORDER

BEFORE: KENNEDY, BOGGS, and SUHRHEINRICH, *Circuit Judges.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1332. Diversity of citizenship; amount in controversy, costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

1. citizens of different States;
2. citizens of a State and citizens or subjects of a foreign state;
3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
4. a foreign state, defined in Section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For purposes of this section, Section 1335, and Section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purpose of this section and Section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. §1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Federal Rule of Civil Procedure 41 Dismissal of Actions

(a) *Voluntary Dismissal: Effect Thereof.*

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) *Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall

be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of Previously Dismissed Action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Federal Rule of Civil Procedure 60(b)

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the

judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(2)

No. 90-909

Supreme Court, U.S.
FILED
FEB 6 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

PUREX CORPORATION, *et al.*,
Petitioners,

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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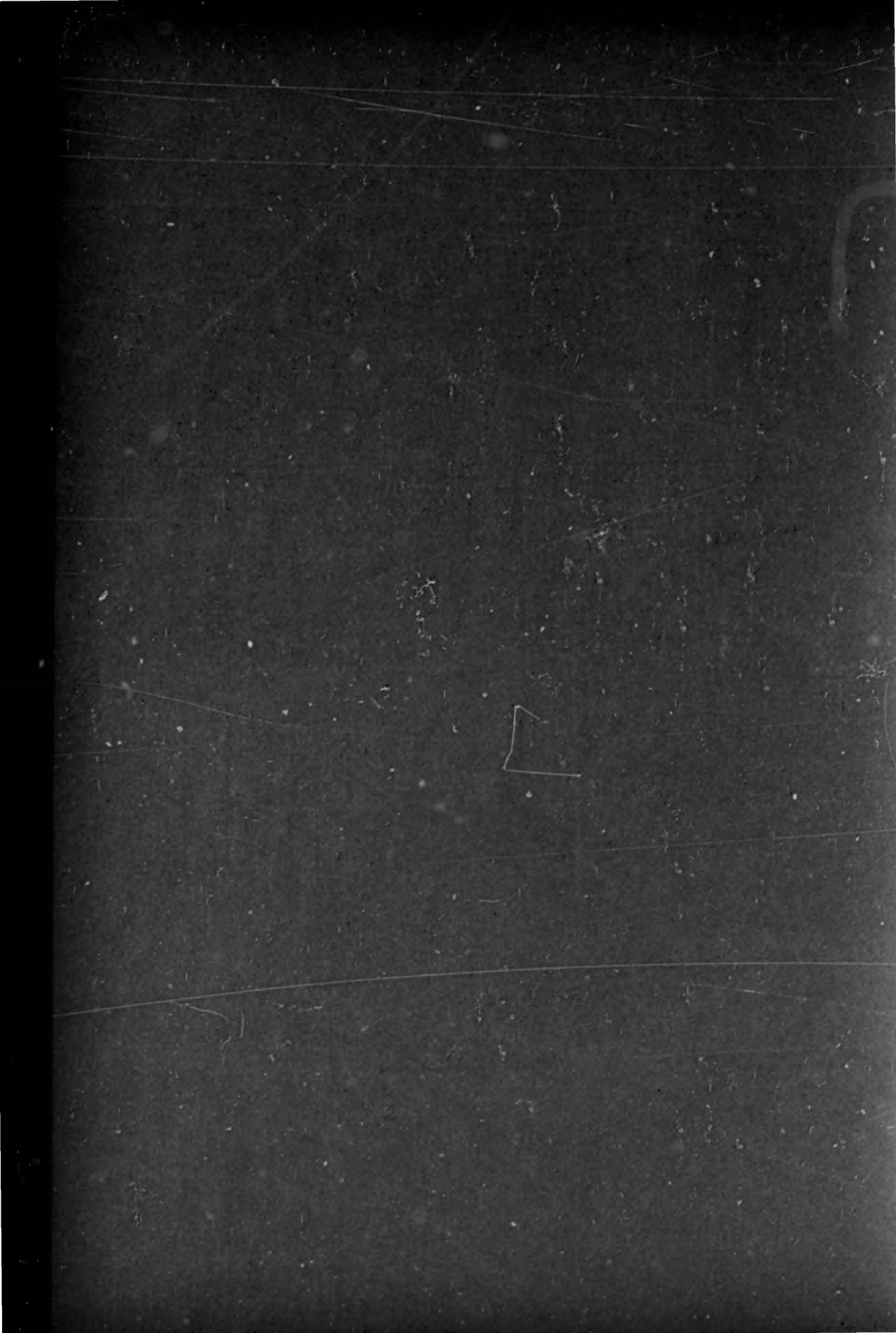

QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURTS OF APPEALS HAVE RENDERED CONFLICTING DECISIONS WITH RESPECT TO A DISTRICT COURT'S ABILITY TO ENFORCE A SETTLEMENT AGREEMENT IN AN ACTION THAT HAS BEEN CONDITIONALLY DISMISSED?

2. WHETHER PETITIONERS, PUREX CORPORATION, INC. AND THE DIAL CORPORATION (COLLECTIVELY "DIAL"), RAISED THE ISSUE OF THEIR ATTORNEYS' AUTHORITY TO ENTER INTO A SETTLEMENT AGREEMENT BEFORE THE DISTRICT COURT?

3. WHETHER DIAL RAISED THE ISSUE OF DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA IN THE COURT OF APPEALS FOR THE SIXTH CIRCUIT?

RULE 29.1 CORPORATE PARTY'S AFFILIATION

Respondent Willis Day Properties, Inc. ("Willis Day") does not have any parent companies or subsidiaries.

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No. 90-909

IN THE

Supreme Court of the United States

October Term, 1990

PUREX CORPORATION, *et al.*,
Petitioners,

.vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG CIRCUIT COURTS OF APPEALS ON THE SPECIFIC ISSUE WITH WHICH THIS COURT IS PRESENTED.

A. The Various Circuit Courts Of Appeals Agree That A District Court Maintains Jurisdiction To Enforce A Settlement Agreement Where An Action Has Been Conditionally Dismissed.

Petitioners ask this Court to grant certiorari in this case to determine whether a district court has the inherent power to enforce a settlement agreement once the action which gave rise to that agreement has been dismissed. They claim that "[t]here is considerable controversy among the Circuit Courts of Appeals (and sometimes even within each Circuit) on the question whether a district court has jurisdiction to enforce a settlement after its dismissal of the underlying action." (Petition for Writ of Certiorari ("Petition") at page 10). While Petitioners are correct in stating that a conflict exists among Circuit Courts of Appeals with respect to a district court's inherent power to enforce a settlement after dismissal; the issue with which this Court is presented is much narrower.

Here, the only issue is whether a district court can retain jurisdiction to enforce a settlement agreement by entering a "conditional" dismissal of litigation pending before it. Willis Day contended on appeal that a district court had the inherent power to enforce a settlement generally.[1] It further contended that even if this general authority did not exist, the district court had the power

[1] It should be noted that Petitioners also asserted that a district court had the inherent power to enforce a settlement agreement in their Motion to Enforce the Settlement Agreement ("Motion to Enforce") originally filed with the district court. Petitioners only began asserting the contrary position when the district court made a factual finding that did not support their version of the agreement.

to enforce the settlement in this case because it retained jurisdiction over the matter through its conditional dismissal of the litigation. Without rejecting the former contention, the Sixth Circuit based its holding on the latter stating that "[t]he narrow issue presented is whether this is a 'conditional' or an 'unconditional' dismissal order as entered by the district court." (Appellate decision at Pet. App. page A4).

There is no conflict among the Courts of Appeals with respect to this narrow issue. It is well settled that district courts retain the power to enforce agreements entered into in settlement of litigation pending before them when the court's dismissal is conditional. *See, e.g., Halderman v. Pennhurst State School and Hospital*, 901 F.2d 311, 317 (3rd Cir. 1990), *cert. denied*, 112 L. Ed. 2d 107, 111 S. Ct. 140; *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Hinsdale v. Farmers National Bank and Trust Co.*, 823 F.2d 993 (6th Cir. 1987)[2]; *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985); *Adduono v. World Hockey Association*, 824 F.2d 617, 621-22 (8th Cir. 1987); *Hamilton v. School Committee of City of Boston*, 725 F. Supp. 641 (D. Mass 1989).

In fact, it has been specifically held that while there is a conflict among the Circuit Courts of Appeals as to whether district courts generally have the inherent power to enforce settlement agreements "[t]here is agreement that while a case is pending, or whenever the court retains jurisdiction for the purpose, a district court may

[2] In *Hinsdale*, 823 F.2d at 995, n.1, the court held that "[w]here a district court dismisses a lawsuit pursuant to Rule 41(a)(2), the district court may condition dismissal upon performance of and retain jurisdiction to enforce terms of a settlement agreement". Here the dismissal was made without prejudice by the court pursuant to Rule 41(a)(2).

enforce a settlement agreement as part of its ancillary jurisdiction." *Hamilton v. School Committee of City of Boston*, 725 F. Supp. at 643. *See also Langella v. Anderson*, 734 F. Supp. 185, 190 n.12 (D. N.J. 1990) in which the district court for New Jersey surveyed various jurisdictions on this issue and noted that "[i]t is also well settled that a court has inherent power to enforce settlement agreements without an independent basis for jurisdiction where the agreement is incorporated in the order of dismissal or the court retains jurisdiction over some portion of the action". Dial's Petition does not cite any case law to the contrary.

A conditional dismissal was not at issue in *Fairfax Countywide Citizens Assn. v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978) *cert. denied*, 439 U.S. 1047, the case upon which Dial most heavily relies. Moreover, while the court in *Fairfax* held that, generally, a district court does not have the inherent power to enforce a settlement, it did concede that a district court does have such power under appropriate circumstances. *Fairfax*, 571 F.2d at 1304. In so doing, it approved of one aspect of the Sixth Circuit's reasoning on the issue stating that where "the settlement agreement resolved the dispute giving rise to the original litigation over which the district court had jurisdiction, any dispute involving the agreement itself was likewise properly before the court." *Id.* at 1304.[3] Here, the dispute involves the agreement itself. Therefore, even under *Fairfax*, the decision of the district court in this instance was correct.

[3] This statement underscores the factual distinction between *Fairfax* and the present case. In *Fairfax*, the plaintiff asked the district court to enforce a settlement in a case that had been dismissed for three years when a non-party to the litigation obtained an injunction against acts required by the settlement agreement. Here, the parties only asked the court to make a factual determination as to the terms of the agreement which settled the lawsuit.

B. The District Court's Dismissal Of The Underlying Action Was Conditional.

It has been consistently held that no specific language is necessary to effect a "conditional" as opposed to an "unconditional" dismissal. "[A]ll that is necessary is that it be possible to infer that [the trial judge] did intend to retain jurisdiction—that he did not dismiss the case outright, thereby relinquishing jurisdiction." *McCall-Bey v. Franzen*, 777 F.2d at 1188.

In this case it is clear that the district court's dismissal was conditional. First, the dismissal was without prejudice. A final dismissal with prejudice was contingent upon the signing of a written settlement agreement. Second, the dismissal entry gave the parties leave to file a settlement agreement. On these bases, the Sixth Circuit made a factual determination that the dismissal was conditional. It stated:

> A plain reading of the district court's dismissal order indicates that it fully intended to retain jurisdiction over this matter until settlement stipulations were filed by the parties. It is also worth noting that the parties, including Purex, construed the dismissal as "conditional" as evidenced by the motions for enforcement that were filed with the district court approximately four months subsequent to the district court's dismissal order.

(Appellate Decision at Pet. App. pp. A4-5).

Although Petitioners maintain that a district court cannot retain jurisdiction by entering a conditional dismissal, they do so without benefit of supporting case law. Moreover, the arguments they set forth in support of their position are unpersuasive; so much so that they were rejected by the only case from which Petitioners

cite supporting dicta.[4] Lastly, although Petitioners claim that the district court in this case could not have intended to retain jurisdiction to enforce the settlement because there was none at the time of dismissal, there was, in fact, a settlement. The settlement was what prompted the dismissal. The fact that it had not yet been committed to paper at the time of dismissal does not mean that the contract was not formed. *Arnold Palmer Golf Co. v. Fugua Industries, Inc.*, 541 F.2d 584, 587 (6th Cir. 1976) (applying Ohio law); *McMillen v. Willys Sales Corp.*, 118 Ohio App. 20, 193 N.E.2d 160 (1962).

Even assuming Dial's position is persuasive, this Court should not grant certiorari because the issue presented is based on an unusual fact pattern, not likely to consistently recur. Dial conceded that "the applicability of the retained jurisdiction theory is extremely limited" because most cases are not dismissed pursuant to Fed. R. Civ. p. 41(a)(2) (Petition at p. 18). *See also McCall-Bey*, 777 F.2d at 1184. Because the situation presented here arises from unique factual circumstances, this Court's review is not warranted.

This Court's inquiry, however, need not go that far. The Sixth Circuit made a factual determination that the district court's dismissal was conditional. Because there is no disagreement among the Courts of Appeals regarding a district court's ability to retain jurisdiction through a conditional dismissal, this case presents nothing for the United States Supreme Court to resolve.

---

[4] The court, in *McCall-Bey*, only expressed doubt as to whether a dismissal pursuant to 41(a)(2) automatically gives a court inherent power to enforce a settlement. In *McCall-Bey*, as in this case, the court found that the language used in entering the dismissal rendered the dismissal conditional. *McCall-Bey*, 777 F.2d at 1188.

II. DIAL DID NOT RAISE THE ISSUE OF ITS ATTORNEYS' AUTHORITY TO ENTER INTO THE SETTLEMENT AGREEMENT BEFORE THE DISTRICT COURT.

Petitioners also claim that this Court should grant certiorari because they are entitled to a determination on an issue that both the district court and the Sixth Circuit refused to decide. Specifically, Petitioners contend that the district court refused to determine whether their attorneys had authority to enter into the settlement the court determined they had made. They further claim that when the issue was raised on appeal the Sixth Circuit erroneously found that it was not raised below. However, the fact remains that Dial did not raise the issue of authority in its Motion to Enforce or at the evidentiary hearing. Therefore, the district court was not compelled to decide the issue nor was the Sixth Circuit required to review it (Petition at p. 20).

It is axiomatic that an appellate court will not review on appeal issues that were not raised below. *Lujan v. Franklin County Board of Education*, 766 F.2d 917, 931 (6th Cir. 1985); *Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir. 1983), *cert. denied*, 464 U.S. 835; *Holden v. Owens-Illinois*, 793 F.2d 745, 754 (6th Cir. 1986), *cert. denied*, 479 U.S. 1008. Here, the Sixth Circuit had access to all of the pleadings, testimony and argument before the district court and made a factual determination that Dial had not raised the issue below. It stated:

> [W]e find nothing in the record which indicates that Purex raised the issue of its attorney's authority to settle this lawsuit in the lower court. There are no facts, nor is there any ruling by the district court, from which this court can properly review Purex's contention that its attorneys overreached their

> settlement authority. Accordingly, we hold that Purex did not properly preserve this issue for appeal. *Bailey v. Chattem, Inc.*, 684 F.2d 386 (6th Cir. 1982).

(Appellate Decision at Pet. App. pp. A5-6).

In its Petition, Dial presents no evidence demonstrating that it raised the issue in the district court. It only states that "the issue was raised by the evidence" (Petition at p. 20). The authority issue was not raised in the Petitioners' Motion to Enforce or in any other pleading. At the evidentiary hearing, Dial's counsel neither asked for a ruling on the issue nor, despite their contention in the Petition, addressed the issue in their argument. Dial's counsel only asked the court to make a factual determination as to what was agreed upon during the settlement discussions of December 6, 1988.

Petitioners, nevertheless, insist that the issue was raised because their attorneys testified that they did not have authority to settle any other litigation on Dial's behalf arising out of the fire.[5] Despite Petitioners' contentions, however, the mere fact that evidence which could support a finding on a certain issue is presented, does not mean that the issue was raised.

---

[5] Dial asserted on appeal that an agent's own statements regarding its specific authority are "insufficient to establish that authority" (Appellants' brief at p. 18). At the evidentiary hearing Dial did not call any corporate representatives to testify on the issue of authority. Nor did it raise the authority issue in its Motion to Enforce, or otherwise put Respondents on notice of its contention. By failing to do any of the foregoing, Dial precluded Respondents from entering evidence on or cross-examining individuals with respect to this issue while still claiming to preserve it for appeal.

Even if this Court were to find that Dial preserved this issue for appeal, the Sixth Circuit, nonetheless, resolved the issue in favor of Willis Day. The court noted that Dial only cited cases involving an attorney's authority to enter into a binding agreement on behalf of his client in the context of real estate transactions (Appellate Decision at Pet. App. p. A6, n.3). The court went on to find that it appeared that in other circumstances where an attorney exceeded his authority, a client's remedy against the attorney was an action for malpractice, not an appeal to set aside an otherwise valid settlement agreement. *Id.* Therefore, even if the issue was preserved, it was reviewed and appropriately decided.

III. DIAL DID NOT RAISE THE ISSUE OF DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION BELOW.

Lastly, Dial asserts that this Court should grant certiorari because the district court's refusal to decide the issue of its attorneys' authority denied it due process. This argument fails for two reasons. First, Dial's failure to raise the authority issue in the district court moots all issues based thereon as fully discussed in Section II of this brief. Second, assuming *arguendo,* the issue was raised before the district court, Dial was aware of the district court's alleged failure to address the issue when the district court rendered its decision. If Dial wanted to raise the due process issue, it should have done so at the appellate court level. Because this issue was not raised below it can not be raised at first instance before this Court. *Browning-Ferris v. Kelco Disposal,* 492 U.S. _____, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989).

Even if the due process claim had been properly raised, Dial's arguments thereon are nonetheless unpersuasive. Dial cites several cases for the proposition that "it is a violation of due process to decide an issue incorrectly" (Petition at p. 25). Based on that proposition, Dial goes on to state that *a priori* "it is a violation of due process to not decide the issue at all" (*Id.*). If Dial's reasoning is followed to its logical conclusion, any matter which this court could conceivably find had been wrongly decided would result in a denial of due process. This, of course, is simply not the case.

Dial states it was denied its due process guarantee of notice and opportunity to be heard despite the fact that Dial instituted the proceedings that gave rise to this petition, framed the issues to be determined and presented evidence in support of its position at the evidentiary hearing. In so doing, Dial did not raise the issue of authority. A due process argument cannot now cure Dial's failure to preserve issues for appeal.

CONCLUSION

This Court should deny Dial's Petition for Writ of Certiorari for three reasons. First, there is no conflict among Courts of Appeals with respect to a district court's authority to enforce a settlement agreement in an action that has been conditionally dismissed. Second, Dial failed to raise the issue of its attorneys' authority to settle in the district court and, therefore, that issue was not properly preserved for appeal. Third, Dial did not raise its due process claim before the Sixth Circuit Court of Appeals and, therefore, cannot raise it at first instance before this Court.

Respectfully submitted,

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No. 90-909

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IN THE

Supreme Court of the United States

October Term, 1990

PUREX CORPORATION, *et al.*,
Petitioners,

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT ABLE WAREHOUSING & DISTRIBUTING COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES A UNITED STATES DISTRICT COURT RETAIN JURISDICTION TO ENFORCE A SETTLEMENT AGREEMENT AFTER IT HAS EXPRESSLY CONDITIONED DISMISSAL OF THE UNDERLYING ACTION, AS WITHOUT PREJUDICE, AND WITH LEAVE TO FILE ADDITIONAL SETTLEMENT STIPULATIONS?

II. IS A PARTY ENTITLED TO AN APPELLATE COURT'S DETERMINATION AND APPLICATION OF STATE LAW IN AN ISSUE WHICH WAS NEITHER RAISED IN THE PLEADINGS NOR ARGUED BEFORE THE DISTRICT COURT?

III. DO FEDERAL COURTS VIOLATE A PARTY'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THEY REFUSE TO CONSIDER AN ISSUE OF STATE LAW WHICH WAS NEITHER RAISED IN THE PLEADINGS NOR ARGUED BEFORE THE DISTRICT COURT BY THIS SAME PARTY?

29.1 STATEMENT

Able Warehousing & Distributing Company, Inc. is a wholly owned corporation in the State of New Jersey. It has no parent corporations, affiliates or subsidiaries.

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RESPONDENT ABLE WAREHOUSING & DISTRIBUTING COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

On February 19, 1987, Purex Corporation and the Dial Corporation ("Purex") filed a diversity action to recover damages to personal property and clean-up expenses caused by a July 7, 1985 fire. The fire occurred at a Toledo, Ohio warehouse owned by Respondent Willis Day Properties, Inc. ("Willis Day") and managed by Respondent Able Warehousing & Distributing Company, Inc. ("Able"). On December 6, 1988, counsel for all parties entered into good faith settlement negotiations to settle Purex's claims for damages. At the settlement negotiations, Purex was represented by Miles A. Jellinek, Esq., both as to Purex's subrogee Certain Underwriters at Lloyd's and as to Purex individually, and Richard F. Ellenberger, Esq., as to Purex individually. Attorney Jellinek acted as lead counsel for Purex and had apparent authority to negotiate all aspects of the case.

On December 6, 1988, the parties agreed to settle this case. Purex in consideration for payment of $650,000 from Willis Day and Able, agreed to release all claims against Willis Day and Able with respect to the July 7, 1985 fire. After the agreement was reached, counsel, on December 6, 1988, informed the district court that the parties had settled. The district court entered a Dismissal Entry the following day which stated:

> Upon consideration, the Court having been informed that the above entitled cause of action has been settled between the parties,
>
> IT IS ORDERED that the docket for this case be marked "settled and dismissed without prejudice." Counsel granted leave to file additional settlement stipulation.

The following day, December 7, 1988, Attorney Jellinek attempted to alter the settlement agreement to reserve Purex's right to assert claims against Willis Day and Able in a related case pending in Lucas County Common Pleas Court.[1] Counsel for Able replied on December 9, 1988 that such a reservation was not a term of the December 6, 1988 agreement. In subsequent discussions,[2] counsel for Able, Willis Day and Purex confirmed the language of the release. As a result of the discussions with Purex's counsel, Able forwarded its settlement draft to Attorney Jellinek.

On February 8, 1989 Attorney Ellenberger attempted to revise the agreed upon release, proposing language which purported to release the claims of both Purex and its subrogee, while reserving the right to assert claims against defendants in the IRI case. On March 13, 1989, Attorney Jellinek attempted another revision of the terms of the agreed upon release with language that released only the claims of the subrogee with no specific language as to the release of claims. It is this March 13, 1989 unilaterally drafted Release that Purex moved the district court to summarily enforce on April 6, 1989.[3]

---

[1] *Industrial Risk Insurers v. Purex Corporation* (Lucas County Common Pleas Case No. 88-3849) (hereinafter "the IRI case").

[2] *See e.g.*, December 20, 1988 letter from counsel for Able to Mr. Jellinek: discussions regarding the proposed language of the release (Motion of Able to Enforce Settlement, Exhibit B).

[3] Subsequent to the filing of Purex's Motion to Enforce the Settlement Agreement, Purex submitted a Supplemental Memorandum which purports to present yet another release, this one releasing the claims of Purex.

On April 15, 1989, Willis Day filed its brief in opposition to Purex's motion for entry of judgment and requested an evidentiary hearing on the disputed terms of the settlement agreement. On April 25, 1989, Able filed its motion to enforce the settlement and its opposition to Purex's motion to enforce the settlement.

On July 21, 1989, the district court held an evidentiary hearing on Purex's, Willis Day's and Able's motions. The district court heard testimony in support of each party's position. Furthermore, the parties cross-examined every witness who gave testimony at the hearing.

On September 19, 1989, the district court entered its order denying Purex's motion to enforce the settlement agreement and granting Able's motion to enforce the terms of the settlement agreement. The district court found that the settlement agreement was set forth in a December 29, 1989 letter from Able's Counsel to Attorney Jellinek.

Purex filed its Notice of Appeal on October 17, 1989. On September 11, 1990 the Sixth Circuit Court of Appeals filed its Opinion affirming the district court's decision. Purex then petitioned the Sixth Circuit for a rehearing *en banc*. The Sixth Circuit rejected Purex's petition on October 19, 1990.

ARGUMENT

Purex contends that the Court should grant its petition for writ of certiorari for three reasons: 1) to resolve the conflict among the circuits regarding the jurisdiction of a district court to enforce a settlement after a dismissal; 2) because the appellate court failed to address an issue which was allegedly presented to the district court; and 3) because it was allegedly denied due process. Purex's contentions, however, do not support the Court granting its petition for writ of certiorari.

I. THE SIXTH CIRCUIT'S DECISION IN THE CASE AT BAR DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Purex states that there is considerable controversy among the Circuit Courts of Appeals on the question whether a district court has jurisdiction to enforce a settlement after its dismissal of the underlying action. The controversy, however, is not as Purex contends. There are two lines of authority on whether a district court has jurisdiction to enforce a settlement agreement after the underlying federal action has been dismissed. *See Hamilton v. School Committee of City of Boston*, 725 F. Supp. 641 (D. Mass. 1989). One line of authority holds that a district court must explicitly retain jurisdiction in order to have authority over purely derivative enforcement claims.[4] *See Fairfax Countywide Citizens Assn. v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047; *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985). The second line of authority holds that the district court has inherent power to enforce agreements that settle federal cases. *See Aro Corp. v. Allied Wittan Co.*, 531 F.2d 1368 (6th Cir. 1976).

[4] Whether the district court has expressed its intentions to retain jurisdiction to enforce a settlement is an issue of fact that is interpreted differently among the circuits. *See McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985); *Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987).

In the case at bar, the Sixth Circuit Court of Appeals held that the district court had the inherent power to enforce agreements entered into in settlement of litigation pending before it. The Court also held that the district court's dismissal order indicates that it intended to retain jurisdiction over this matter until settlement stipulations were filed by the parties. The Sixth Circuit Court of Appeals stated:

> *It is well settled that "courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them."* [citations omitted]. Further, no specific language is necessary to effect a "conditional" as opposed to an "unconditional" dismissal: "[A]ll that is necessary is that it be possible to infer that [the trial judge] did intend to retain jurisdiction—that he did not dismiss the case outright, thereby relinquishing jurisdiction." [citation omitted.]
>
> *A plain reading of the district court's dismissal order indicates that it fully intended to retain jurisdiction over this matter until settlement stipulations were filed by the parties.* It is also worth noting that the parties, including Purex construed the dismissal as "conditional" as evidenced by the motions for enforcement that were filed with the district court approximately four months subsequent to the district court's dismissal order.[5]

(Emphasis added). Thus, the Sixth Circuit Court of Appeals held that the district court had jurisdiction to enforce the settlement agreement for two reasons: (1) the court's inherent power; and (2) the fact that the court retained jurisdiction over this matter pending the filing of the settlement stipulations.

---

[5] It is worth noting that in Purex's April 4, 1989 memorandum in support of its motion for enforcement of the Settlement Agreement, Purex argued that the district court had the inherent power to enforce settlement agreements entered into by parties in a pending action. Purex's current position is irreconcilable with its earlier posture and strains the credibility of this claimed error.

Petitioners contend that its petition for writ of certiorari should be granted because there exists a conflict among the Courts of Appeals regarding the jurisdiction of a district court to enforce a settlement after dismissal of the underlying action. Rule 10.1(a) of Rules of the Supreme Court, however, lists reasons that will be considered for granting a petition for writ of certiorari. Rule 10.1(a) provides:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; ***

Thus, under the Supreme Court Rules, the Court of Appeals' decision must conflict with the decision of another Circuit Court of Appeals in order for this Court to consider granting a petition for writ of certiorari.

In the case at bar, the Sixth Circuit Court of Appeals' decision conflicts with neither the *Aro* line of authority nor the *Fairfax/McCall-Bey* line of authority. Consistent with *Aro*, the Sixth Circuit in the case at bar held that the district court had the inherent power to enforce the settlement agreement at issue. Additionally, the Sixth Circuit, consistent with *Fairfax/McCall-Bey*, held that the district court expressly retained jurisdiction to enforce the settlement agreement. The Sixth Circuit's decision, therefore, comports with both lines of authority regarding a district court's jurisdiction to enforce a settlement agreement after the underlying action has been dismissed.[6] As a result, the Court should deny Purex's petition with respect to the jurisdictional issue.

---

[6] Given Purex's failure to raise the lack of jurisdiction issue in the district court and the lack of a conflict between the Sixth Circuit's decision and other jurisdictions, this case is not a good vehicle for review of the jurisdiction issue.

II. A LITIGANT IS NOT ENTITLED TO AN APPELLATE COURT'S DETERMINATION OF AN ISSUE WHICH WAS NOT RAISED IN THE DISTRICT COURT.

Purex contends that the Court should grant certiorari in this case because the Sixth Circuit refused to decide whether Purex's attorney had authority to enter into the settlement agreement. Purex contends that this issue was raised by the evidence and argued by counsel at the evidentiary hearing in the district court. Purex's contention, however, is erroneous.

In April 1989, Purex filed its motion for entry of judgment enforcing the December 6, 1989 settlement agreement. In its motion Purex stated:

> 9. Pursuant to the terms of the settlement set forth in Paragraph 6 above, defendants have transmitted the settlement funds to plaintiffs. However, the settlement checks have not been negotiated by plaintiffs Purex Corporation and The Dial Corporation for the reason that the parties have been unable to agree upon appropriate language for the releases embodying the settlement agreement among the parties.
>
> * * *
>
> 11. As there was no agreement among the parties to settle any claims other than those which form the subject matter of Case No. C 87-7139, plaintiffs respectfully move this Court for an Order enforcing such settlement agreement.

At no time after the filing of its motion to enforce the settlement agreement did Purex attempt to amend the relief sought. Thus, the only issue before the district court was the terms of the settlement agreement.

This fact was emphasized at the hearing where Purex's counsel stated the relief it sought.

> What brings me here is to request that the Court order the following, that either the defendants accept the executed releases that they already have from both Underwriters of Lloyd's and the Purex-Dial Corporations.
>
> In the alternative, that the Court make findings of fact as to what the terms of the settlement on December 6, 1988 were such that those findings are binding on all of the parties as if releases were executed to that effect, and further that the Court order the Purex and Dial Corporation to endorse the settlement checks promptly so that this thing can be finally put to bed.

Purex never raised the lack of its attorneys' authority to settle the case at the district court level. Federal Rules of Civil Procedure 46 requires a party to make known to the court the action which the party desires the court to take. Purex, however, never properly raised the lack of authority issue with the district court nor did Purex otherwise attempt to give the district court any opportunity to review this issue, for example, by way of motion for clarification or for reconsideration.

On appeal, Purex for the first time raised the lack of authority issue. The Sixth Circuit held:

> [W]e find nothing in the record which indicates that Purex raised the issue of its attorney's authority to settle this lawsuit in the lower court. There are no facts, nor is there any ruling by the district court, from which this Court can properly review Purex's contention that its attorneys overreached their settlement authority. Accordingly, we hold that Purex did not properly preserve this issue for appeal. *Bailey v. Chattem, Inc.*, 684 F.2d 386 (6th Cir. 1982).

Thus, the Sixth Circuit properly refused to decide the issue of whether Purex's attorneys had authority to enter the December 6, 1988 settlement agreement.

Generally, appellate courts do not consider issues that were not presented to the district court. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713 (1985). The Sixth Circuit refused to decide the authority issue because it had not been raised in the district court. Moreover, this Court does not generally review factual determinations which the lower courts make. *See United States v. Johnston*, 268 U.S. 220 (1925). A writ of certiorari will be granted only when there are special and important reasons. Sup. Ct. R. 10. As a result, the Court should deny Purex's petition with respect to the authority issue.

III. THERE ARE NO DUE PROCESS CONCERNS WHEN AN ISSUE IS NOT RAISED IN THE DISTRICT COURT.

Petitioners contend that it was a violation of the Due Process Clause of the 14th Amendment for the district court and Sixth Circuit to refuse to decide the issue of whether Petitioner's attorneys had the authority to enter into the December 6, 1988 settlement agreement. As stated above, this constitutional issue was not raised in the district court, nor did Purex raise it with the Sixth Circuit.

In *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976), the Court held:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Id. at 120, 2877. Further, federal courts will avoid constitutional questions where nonconstitutional grounds can be dispositive of the issues. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). As the above-cited authorities establish, this Court need not address Petitioner's constitutional claims. Accordingly, the Court should not grant certiorari with respect to the due process issue.

CONCLUSION

For the reasons set forth above, Respondent Able Warehousing & Distributing Company, Inc. respectfully requests that this Court deny Purex's Petition for Writ of Certiorari.

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